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In The

Supreme Court of the United States

October Term, 1977

No. 77-1804

DOUGLAS C. THOMPSON,

Petitioner,

vs.

L. JOHN ONSTAD, SHERIFF, GALLATIN COUNTY, MONTANA; and ROGER CRIST, WARDEN, MONTANA STATE PRISON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MIKE GREELY
Attorney General
State of Montana
Helena, Montana 59601

ALLEN B. CHRONISTER
Assistant Attorney General
State of Montana
Helena, Montana 59601
Attorneys for Respondent

JAMES H. GOETZ, Esq.
GOETZ & MADDEN
522 West Main Street
Bozeman, Montana 59715
Attorneys for Petitioner

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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ARGUMENT

The respondent's argument that a Writ of Certiorari should not be granted in his case will be presented in the same order as the counter arguments raised in the petition.

A. The State Court has decided all Federal Constitutional Questions in accord with applicable decisions of this Court.

The petitioner relies upon Rule 19 of the Rules of this Court for the proposition that certiorari should be granted because decision of the Montana Supreme Court below is "squarely contrary to applicable Federal Constitutional Law." In *State v. Thompson,* 545 P. 2d 1070 (Mont. 1976) the Montana Supreme Court, in a unanimous decision, affirmed the petitioner's conviction on two counts involving the possession and sale of dangerous drugs.

That opinion dealt in large part with petitioner's two-pronged attack upon the warrant issued to search his residence. The petitioner argued that probable cause was lacking first because the issuing magistrate, District Judge Shanstrom, was not a "detatched magistrate," and second because the informant's reliability was not established. Both challenges to the warrant were decided against the petitioner, and he has evidently abandoned the first ground in this petition.

The thrust of petitioner's present argument upon this point seems to be that the Montana Supreme Court wrongfully held that the probable cause showing required by *Aguilar v. Texas,* 378 U. S. 108 (1964) and *Spinelli v. U. S.,* 393 U. S. 410 (1969) may be bolstered by testimony outside of the four corners of the affidavit. See *Stone v. Powell,* 428 U. S. 465, n. 3 (1976). This is not the case. The Montana Supreme Court has clearly recognized and abided by the decisions of this Court concerning the requirements for search warrants. See *State v. Troglia,* 482 P. 2d 143 (Mont. 1971); *State v. Paschke,* 527 P. 2d 569 (Mont. 1974); *State v. Thorsness,* 528 P. 2d 692 (Mont. 1974); *State ex rel. Townsend v. District*

Court, 543 P. 2d 193 (Mont. 1975); *State v. Leistiko,* — P. 2d — (No. 13802, Decided May 1, 1978).

As the Montana Supreme Court found, the affidavit below "was wholly sufficient to establish probable cause. . . ." (545 P. 2d at 1072). This is correct, since an affidavit that contains the underlying circumstances of how, where, when and what the affiant or informer observed is sufficient under Montana law and the United States Constitution to establish that probable cause exists for the issuance of a search warrant. In this case the affidavit disclosed the following facts:

(1) when the named informant acquired his knowledge;

(2) how he acquired this knowledge;

(3) where he acquired this knowledge;

(4) who was living at the named address at that time;

(5) what was purchased at that address;

(6) how much was purchased at that address;

(7) how the dangerous drugs were stored at that address;

(8) where in the house the dangerous drugs were located;

and

(9) confirmation that the informant had knowledge that the drugs were still located at that address or had been 12 hours previous to the application of the search warrant.

The Montana Supreme Court, recognizing that an affidavit for a search warrant cannot be supplemented by oral statements to a magistrate (*State ex rel. Towns-*

end v. District Court, supra), merely held that where the affidavit is based upon the statements of a known and named informant, that informant can be examined by the magistrate to further check the informant's reliability. This was found to be the purpose of Judge Shanstrom's examination of the informant (545 P. 2d at 1072).

Since both *Aguilar* and *Spinelli* involved unnamed informants, this Court held that the informant's reliability or the credibility of his information must appear within the four corners of the affidavit. When the informant is known, named and appears before the magistrate, however, the "cases on unnamed informants are not in point." (545 P. 2d at 1072). This distinction has been recognized by other courts. *U. S. v. Goldstein,* 532 F. 2d 1305, 1313 (9 Cir. 1976). Thus, the oral testimony was not to provide or supplement probable cause; it merely provided a "direct test of reliability by a conscientious magistrate (545 P. 2d at 1072).

The underlying circumstances that Judge Shanstrom knew from the application, together with the facts that he had a chance to examine not only the affiant but also the informant under oath and that unlike either *Aguilar* or *Spinelli* the informant was named and appeared, show that the *Aguilar-Spinnelli* tests were more than fulfilled. Therefore, there has been no decision by the Montana Supreme Court contrary to applicable Federal Constitutional law as required by Rule 19 of Rules of this Court.

B. The District Court and the Ninth Circuit have correctly applied this Court's decision in Stone v. Powell.

The District Court, by its Order of October 26, 1976, found that the petitioner "was afforded a state hearing on the issues raised," and therefore denied habeas corpus relief on the basis of *Stone v. Powell,* 428 U. S. 465 (1976).* That Order was affirmed by the Ninth Circuit, citing *Stone v. Powell.* The petitioner argues herein that these applications of *Stone v. Powell* were "wooden" and "incorrect."

The decision in *Stone v. Powell* need not be related in great detail since it is well known to the Court and

*It should be noted, as pointed out in the Petition, that the District Court initially granted the Writ of Habeas Corpus, finding that the affidavit in support of the search warrant was insufficient, and that probable cause could not be bolstered by testimony outside of the affidavit (see Appendix A-2 through A-10 to the Petition). That opinion was vacated and replaced by the Order of October 26, 1976, denying the petition (see Appendix A-11 to the Petition). It is evident that the District Court's second Order was based not only upon *Stone v. Powell,* but also upon the "briefs of the parties . . ." One of the points made by the State to both the District Court and the Ninth Circuit was that the District Court's original Order rested in part upon a misreading of the Montana Supreme Court's decision in this case. At page A-9 of the Original Order the District Court misquoted the Montana Court as having held that the affidavit was "wholly *insufficient* to establish probable cause" but that it was sufficiently buttressed by oral testimony of the informant. The District Court, of course, did "not agree with this position." To the contrary, the Montana Court's opinion stated that the affidavit was "wholly *sufficient* to establish probable cause" and that the informant's reliability could be further tested before the magistrate (545 P. 2d at 1072). Thus the assertion that the District Court's second Order was based simply upon a "wooden" application of *Stone v. Powell* looses some of its force.

the parties. This Court's holding was clear and explicit (428 U. S. at 481-82):

> We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

The applicability of this holding to the present case is patent, especially when compared to the case of David Rice, one of the two respondents in *Stone v. Powell* (*See* 428 U. S. at 471-74). Rice, like the petitioner herein, was convicted in state court and that conviction was affirmed by the state supreme court.

He applied to the United States District Court for a Writ of Habeas Corpus, arguing that the warrant pursuant to which his home was searched was invalid under *Aguilar* and *Spinelli*. As this Court's footnote 3 to *Stone v. Powell,* clearly shows, Rice's *Aguilar-Spinelli* arguments were almost identical to those made here, although evidently an unknown informant was involved. Both the District Court and the Eighth Circuit granted Rice's petition for a Writ of Habeas Corpus, but this Court reversed in *Stone v. Powell,* holding as quoted above.

Thus, the applicability of *Stone v. Powell,* to the instant case is patent. Even assuming, *arguendo,* that there were "particularly egregious" Fourth Amendment violations here as the petitioner alleges, a very similar situation was presented in *Stone v. Powell,* with the result that this Court denied the availability of habeas corpus relief. This Court need not, therefore, reach the petitioner's argument that *Stone v. Powell* means something other than what its clear language indicates. Perhaps a case will arise affording the opportunity to make whatever clarifications, if any, are needed. The instant petition, however, is not such a case.

The petitioner's reliance upon *Jarrell v. Stahl,* 446 F. Supp. 395 (W. D. N. C. 1977), is similarly misplaced. While the *Jarrell* court evidently felt uncomfortable applying the clear holding of *Stone v. Powell,* it did so and denied habeas corpus relief (446 F. Supp. at 397). The court made it clear that it would like to grant relief since the crime involved was "victimless" and since it was particularly shocked with the way in which the convicting evidence was obtained, without a warrant or statutory authority (446 F. Supp. at 398). Even so, the *Jarrell* court conceded that there were a number of situations in which *Stone* should apply, one of them being cases involving searches pursuant to warrants based upon allegedly defective supporting affidavits (*Id.*). This, of course, is exactly the state of facts present herein. Thus *Jarrell v. Stahl* supports, rather than diminishes, the applicability of *Stone v. Powell* to the instant case.

Further, subsequent cases have made it clear that the *Stone v. Powell* holding means exactly what it says (*see Wainwright v. Sykes,* 433 U. S. 72, 79 (1977), and that within that holding considerable latitude for relief is still available on the question of whether a "full and fair" opportunity was afforded to litigate Fourth Amendment claims in state court. Compare, *e. g., O'Berry v. Wainwright,* 546 F. 2d 1204 (5 Cir. 1977) with *Gates v. Henderson,* 568 F. 2d 830 (2d Cir. 1977). Lastly, petitioner's reliance upon *Fay v. Noia,* 372 U. S. 391 (1963) in support of his argument that the Federal Courts

should have "exercised discretion" to grant relief here is misplaced in light of this Court's limitation in *Stone v. Powell,* of *Fay* in Fourth Amendment habeas corpus cases. *See* 428 U. S. at 491-92, n. 31. See also *Gates v. Henderson, supra,* at 839. As this Court made clear several times in *Stone v. Powell, (Id.*; 428 U. S. at 494-95, n. 37), that decision spoke only to Fourth Amendment claims and was based upon the practicalities of the deterrent aspect of the exclusionary rule. As this Court said (428 U. S. at 493):

> There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions.

Thus, whatever may be said for Federal Court flexibility in considering Fifth or Sixth Amendment claims in habeas corpus proceedings, those arguments no longer apply in Fourth Amendment exclusionary rule cases.

C. The Petitioner was afforded a full and fair opportunity to litigate its Fourth Amendment claim.

Petitioner's argument on this point is largely disposed of by the first issue discussed, *supra,* since it is based upon the premise that the Montana courts made a "serious legal error in construing the Federal Fourth Amendment." As previously discussed, no such error was made. Since the affidavit in support of the warrant was sufficient, there was no error and no conflict with prior rulings of this Court. Further, referring again to the case of David Rice, discussed, *supra,* the alleged error of law made by the state courts in that case was

the same type of error allegedly made here, and this Court denied relief to Rice in *Stone v. Powell.* The issue has therefore been decided, and no "absurd result" not contemplated by *Stone v. Powell,* has been reached.

Even so, the gist of petitioner's third argument is that despite *Stone v. Powell,* a United States District Court should grant a state prisoner habeas corpus relief if the state courts have incorrectly decided his Fourth Amendment claims. Assuming, *arguendo,* that there was an incorrect application of the Fourth Amendment claims below, this contention has been rejected by a number of courts. The court in *Petillo v. New Jersey,* 562 F. 2d 903, 906 (3d Cir. 1977), held:

> The question is not whether the trial court "correctly" decided the fourth amendment issue, but whether the petitioner was given an *opportunity* for *full and fair* state court litigation of his fourth amendment claim. (Emphasis original.)

The Second Circuit used similar language in *Gates v. Henderson, supra,* construing *Stone v. Powell* to hold "that we have no authority to review the state record and grant the writ simply because we disagree with the result reached by the State courts." (568 F. 2d at 840). *See also Holmberg v. Parratt,* 548 F. 2d 745, 746 (8 Cir. 1977); *Cf. Hines v. Auger,* 550 F. 2d 1094, 1097 (8 Cir. 1977). The emphasis of *Stone v. Powell* and later decisions following it is upon the fullness and fairness of the state court's opportunity to the defendant to present his Fourth Amendment claims.

Since the petitioner here does not allege that there are any factual issues in dispute, *Townsend v. Sain,* 372 U. S. 293 (1963), does not apply. The only application for *Townsend* in the *Stone v. Powell* context is when

there are disputed questions of fact, and the issue is whether they were fully and fairly litigated below. *O'Berry v. Wainwright, supra,* at 1211.

The petitioner does not argue that his Fourth Amendment claims were not fully and fairly heard in State court, but rather that he disagrees with the result reached. While state appellate court consideration alone of the Fourth Amendment claims probably suffices here under *Stone v. Powell, O'Berry v. Wainwright, supra,* at 1212-13, the petitioner was given the full opportunity to attack the search warrant upon Constitutional and factual grounds both in the suppression hearing at the trial level, and upon appeal to the Montana Supreme Court. The petitioner has been given his full and fair opportunity as required by *Stone v. Powell.*

———o———

CONCLUSION

The thrust of the petition herein is to erode this Court's ruling in *Stone v. Powell* and to limit its application. Contrary to petitioner's arguments, however, it is clear that *Stone v. Powell* means exactly what its explicit holding says: United States District Courts will not grant habeas corpus relief to a state prisoner on the basis of claimed Fourth Amendment violations if the prisoner has had a full and fair opportunity to litigate those claims in state court. The applicability of this holding to the present situation is patent, and becomes even more so when the facts herein are compared to those of defendant Rice in *Stone.*

The petitioner's attempts to find ways to evade *Stone v. Powell* are unavailing. The premise of these arguments rests upon the assumption that the Montana courts made a serious constitutional blunder when deciding the petitioner's Fourth Amendment claims. As shown above, this is not the case. Therefore, the petitioner's conclusion that he was thereby denied a full and fair state hearing is groundless.

Further, decisions following *Stone v. Powell* clearly indicate that the thrust of the inquiry is not into the technicalities of the state court's decision, but rather into the fullness and fairness of the opportunity to present the Fourth Amendment claims. *Stone v. Powell* is directly on point in cases such as the present one in which the state prisoner was given the opportunity at both trial and appellate levels to present fully his Fourth Amendment claims, and the state courts made good faith decisions to reject those claims.

It is respectfully submitted that all courts below acted within their constitutional responsibilities. Therefore, no reason exists for granting the instant petition for a writ of certiorari, and it should be denied.

Respectfully submitted,

MIKE GREELY
Attorney General
State of Montana

Allen B. Chronister
Assistant Attorney General
State of Montana
Helena, Montana 59601

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